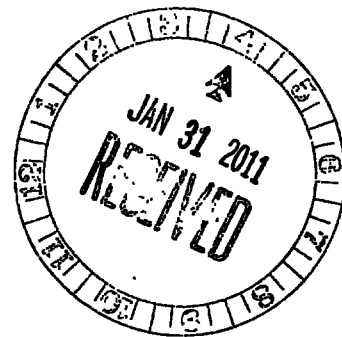


**WEINER
BRODSKY
SIDMAN
KIDER PC**



228721

January 31, 2011

BY HAND

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street, SW
Washington, DC 20423-0001

ENTERED
Office of Proceedings
JAN 31 2011
Part of
Public Record

RE: STB.Ex Parte 704, Notice of Intent to Participate

Dear Ms. Brown:

The American Short Line and Regional Railroad Association ("ASLRRA"), which this firm represents as counsel, files this Notice of Intent to participate in the hearing in this proceeding to be held on February 24, 2010. Richard F. Timmons, President of ASLRRA, will speak on behalf of the ASLRRA. Mr. Timmons requests ten minutes for his presentation.

Enclosed are the original and ten copies of the Testimony of Richard F. Timmons, President, ASLRRA.

Please acknowledge receipt of this letter by date-stamping the enclosed acknowledgment copy and returning it to our messenger.

Very truly yours,

Mark H. Sidman

cc: Richard F. Timmons, ASLRRA

228721



ENTERED
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JAN 31 2011

**Part of
Public Record**

**Mark H. Sidman
Rose-Michele Nardi
Weiner Brodsky Sidman Kider PC
1300 19th Street NW
Fifth Floor
Washington DC 20036-1609
202 628 2000
202 628 2011**

January 31, 2011

BEFORE THE
SURFACE TRANSPORTATION BOARD

REVIEW OF COMMODITY, BOXCAR
AND TOFC/COFC EXEMPTIONS

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)

Docket No. EP-704

**TESTIMONY OF RICHARD F. TIMMONS, PRESIDENT,
AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION**

I am Richard Timmons, President of the American Short Line and Regional Railroad Association, which is the national trade organization that represents approximately 540 Class II and Class III railroads.¹ On behalf of our members I thank the Board for inviting testimony on the Commodity, Boxcar and Intermodal exemptions. ASLRRA believes that the Exemptions are effective, have worked exactly as intended by Congress and benefit both railroads and shippers. There is no need to revisit the rationale underlying the Exemptions because petitions to revoke provide sufficient opportunities for aggrieved parties to seek review of those exemptions. Moreover the low number of revocation petitions filed by aggrieved parties demonstrates that the exemptions are not being abused. Finally, periodic reviews of the

¹ A list of ASLRRA's member railroads is appended hereto as Attachment 1.

Exemptions would force small railroads with limited resources to incur substantial costs to repeatedly defend the exemptions, and effectively would shift the burden of proof to the railroads to prove regulation of the subject traffic continued to be unwarranted, which approach would be inconsistent with the statutory mandate in favor of exemptions and at odds with the current regulatory scheme governing petitions to revoke. ASLRRA urges the Board to refrain from taking any action that would limit or otherwise dilute the effectiveness of the Exemptions. Instead, the Board should continue to uphold the statutory mandate to exempt traffic "to the maximum extent possible". Please refer to my extended remarks regarding these points, which are appended to this written testimony as Attachment 2 and are made a part of it by this reference.

Since the passage of the Staggers Act, almost 300 newly formed railroads have acquired light density lines in communities all across the United States. Many short line properties suffered from years of deferred maintenance and service deterioration, and were candidates for abandonment. Short line entrepreneurs acquired these properties, rehabilitated the track infrastructure, hired and trained staff and revitalized service in communities that faced loss of rail service. Today, these small businesses – with median annual revenues of just \$2.5 million – operate approximately 32 percent of the nation's rail lines and play a critical role in the economy of the communities those

carriers serve. Despite operating approximately one-third of our rail system, small railroads earn less than 5 percent of annual freight revenues. Under these circumstances, it is evident that small railroads do not have any meaningful market power. These small, entrepreneurial businesses do, however, provide essential service to shippers and communities located on light density lines, often in rural areas. The Board should refrain from taking any action with respect to the Exemptions that would adversely affect the regulatory environment in which short lines have been able to thrive.

These exemptions are of critical importance to short line railroads, and in practice they have worked as intended with respect to traffic handled by small railroads. Boxcar traffic and exempt commodities are subject to intense inter- and intra-modal competition. The vigorous competition for boxcar traffic and exempt commodities has kept prices extremely competitive. Indeed, according to Freight Facts and Figures 2009 released by the Federal Highway Administration, trucks handled 60 percent of the freight tonnage moved by the major transportation modes (truck, rail water, air, pipeline and intermodal) in 2008.

For the short lines, the competition is particularly intense. Traffic moving over shorter distances – 500 miles or less – is particularly susceptible to diversion to truck transportation. In recent years larger numbers of heavier trucks and combination

vehicles along with federal legislative initiatives have made the competition even more difficult. Even for traffic moving longer distances, short lines generally must compete with trucks and waterways as well as intermodal operators and rail-truck transload operations located on Class I's. Small railroads, by definition, operate small systems that are in close proximity to Class I carriers. Because a short line generally accounts for only a small portion of the mileage of any interline move, shippers frequently have an opportunity to by-pass a small railroad by trucking their cargo to the nearest transload facility on a Class I rail system. Shippers also can bypass short lines by making intermodal shipments that move onto rails at intermodal facilities served by a Class I carrier. These options make small railroads susceptible to traffic diversion in ways that generally do not affect Class I carriers. Under these market conditions, it is clear that short lines have virtually no opportunity to abuse market power and effective competition for the subject traffic is present. Accordingly, the exemptions are appropriate

It is also important to note that railroads are not the only beneficiaries of exemptions. By deregulating exempt traffic, railroads are able to compete more effectively in markets that previously were dominated by trucks, for example, fresh fruits and vegetables. Short line marketing personnel fight a constant battle to preserve market share. The exemption of boxcar traffic and the exempt commodities has allowed

the free market to function and the short lines to be competitive. Thus, the exemptions benefit shippers by providing them with a competitive alternative to trucks or other modes of transportation. Such competition forces all modes of transportation to provide more efficient and economical service in order to maintain their market share. Shippers are the beneficiaries of this competition.

Retaining the Exemptions is especially important to small railroads because much of the traffic handled by short lines is covered by those exemptions. We believe that more than 50 percent of small railroad traffic consists of boxcar traffic and exempt commodities. The exemptions for boxcar traffic and exempt commodities affect a much higher percentage of small railroad traffic than Class I traffic. Compounding this problem has been a 30-year downward trend in railroad general merchandise traffic of approximately 30-40 percent. Accordingly, any action by the Board to curtail or limit the exemptions would therefore have a disproportionately adverse effect on small railroads.

A curtailment of the Exemptions would be unwarranted with respect to small railroads because, in general, those carriers do not have a history of abusing market power and their service is limited in scope. According to Railroad Facts, the nation's 556 small railroads operate 32 percent of the railroad miles in the country, but earn only 4.22 percent of railroad revenue. This disparity demonstrates that small railroads are

virtually incapable of abusing market power, either in their dealings with shippers or with connecting carriers.

Similarly, small railroad operations are limited in scope. The average short line operates 71 miles of rail lines and handles approximately 13,368 carloads of traffic per year. To put these numbers in perspective, the *smallest* Class I railroad operates 5,823 miles of rail line and handles 361,695 carloads of traffic per year. Accordingly, short line operations are limited in scope.

The Board should not engage in general, periodic reviews of the Exemptions. The revocation framework provides shippers (and others) with an appropriate mechanism for reviewing exemptions for specific abuses. In addition, because a large percentage of small railroad traffic consists of exempt traffic, instituting periodic reviews of the Exemptions would force small railroads, which, by definition, have limited resources, to repeatedly defend the appropriateness of such exemptions. Small railroads simply lack the resources to do so.

In conclusion, ASLRRRA urges that the Board refrain from curtailing or limiting the Exemptions, which would have a disproportionately negative impact on small railroads, continue to rely on the revocation mechanism currently in place to correct any abuses of the Exemptions, and refrain from engaging in periodic reviews of the Exemptions that will force small railroads to engage in costly proceedings.

The ASLRRA appreciates the opportunity to submit this testimony in Ex Parte

704.

Railroad Members

Aberdeen, Carolina & Western Rwy. Co.
Aberdeen & Rockfish Railroad Company
Acadiana Railway Company
Adrian & Blissfield Rail Road Company
Alabama & Gulf Coast Railway
Alabama Railroad Company
Alabama Southern Railroad
Alabama & Tennessee River Railway, LLC
Alabama Warrior Railway
Alamo Gulf Coast Railroad
Alaska Railroad Corporation
Albany & Eastern Railroad Company
Alexander Railroad Company
Aliquippa & Ohio River Railroad
Allegheny Valley Railroad Company
Alliance Terminal Railroad
AN Railway, L.L.C.
Anacostia & Pacific Company, Inc.
Angelina & Neches River Railroad Co.
Ann Arbor Railroad
Apache Railway Company
Appalachian & Ohio Railroad
Appanoose County Community Railroad
Arizona & California Railroad
Arizona Central Rail Road
Arizona Eastern Railway Co.
Arkansas, Louisiana & Mississippi Railway
Arkansas Midland Railroad
Arkansas & Missouri Railroad
Arkansas-Oklahoma Railroad, Inc.
Arkansas Southern Railroad
Ashland Railway, Inc.
Ashtabula, Carson & Jefferson Railroad
Athens Line, LLC
AT&L Railroad Co. .
Atlantic Western Transportation Inc.
Atlantic and Western Railway, L.P.
Austin & Texas Central Railroad
Austin Western Railroad
B & H Rail Corporation
Ballard Terminal Railroad Co., LLC
Baton Rouge Southern Railroad
Bauxite & Northern Railway Co.
Bay Coast Railroad
Bay Colony Railroad Corporation
Bay Line Railroad, L.L.C.

Belt Railway Company of Chicago
Bighorn Divide & Wyoming Railroad, Inc.
Birmingham Southern Railroad Company
Blacklands Railroad
Blackwell Northern Gateway Railroad
The Bloomer Line
Boise Valley Railroad, Inc.
Boone and Scenic Valley Railroad
Border Pacific Railroad Co.
Brandywine Valley Railroad Company
Brownsville & Rio Grande Int'l Railroad
Buckingham Branch Railroad Company
Buffalo & Pittsburgh Railroad, Inc.
Burlington Junction Railway
Butte, Anaconda & Pacific Railway Company
Caddo Bossier Port Commission
Caldwell County Railroad Company
California Northern Railroad
Caney Fork & Western Railroad
Canton Railroad Company
Cape Breton & Central Nova Scotia Railway
Cape May Seashore Lines
Cargill, Incorporated
Carolina Coastal Railway, Inc.
Carolina Piedmont Division
Carolina Southern Railroad Co.
Carrizo Gorge Railway, Inc.
Cascade & Columbia River Railroad
Cedar Rapids & Iowa City Railway Co.
Central California Traction Co.
Central Montana Rail, Inc.
Central New England Railroad
Central New York Railroad Inc.
Central Oregon & Pacific Railroad
Central Railroad Co. of Indianapolis
Central Railroad of Indiana
Charlotte Southern Railroad Company
Chattahoochee Bay Railroad, Inc.
Chattahoochee Industrial Railroad
Chattooga & Chickamauga Railroad
Chesapeake & Albemarle Railroad
Chesapeake and Indiana Railroad Company
Chestnut Ridge Railroad Corporation
Chicago, Ft. Wayne & Eastern Railroad
Chicago Port Railroad Company
Chicago Rail Link
Chicago SouthShore & South Bend Railroad

Cimarron Valley Railroad, L.C.
The Cincinnati Southern Railway
Clarendon & Pittsford Railroad Co.
Cleveland Commercial Railroad Company LLC
Cleveland Works Railway Co.
Cloquet Terminal Railroad Co., Inc.
Colorado & Wyoming Railway Co.
Columbia Basin Railroad Co.
Columbia & Cowlitz Railway Co.
Columbia Terminal
Columbus & Greenville Railway Co.
Columbus & Ohio River Rail Road Co.
Commonwealth Railway, Inc.
Conecuh Valley Railroad
Consolidated Rail Corporation
Coopersville & Marne Railway Company
Coos Bay Rail Link
Copper Basin Railway, Inc.
R.J. Corman Railroad Company/Allentown Lines
R.J. Corman Railroad Company/Bardstown Lines
R.J. Corman Railroad Company/Central Kentucky Lines
R.J. Corman Railroad Company/Cleveland Line
R.J. Corman Railroad Company/Memphis Line
R.J. Corman Railroad Company/Penn Lines
R.J. Corman Railroad Company/Tennessee Terminal
R.J. Corman Railroad Company/West Virginia Lines
R.J. Corman Railroad Company/Western Ohio Lines
Corpus Christi Terminal Railroad
Crab Orchard and Egyptian Railroad
D & I Railroad Co.
Dakota, Minnesota & Eastern Railroad
Dakota, Missouri Valley & Western Railroad
Dakota Northern Railroad, Inc.
Texas Northeastern Railroad
Dallas, Garland & Northeastern Railroad
Decatur Junction Railway Company
Delaware Coast Line Railroad
Delta Valley & Southern Railway Co.
Denver Rock Island Railroad
Depew, Lancaster & Western Railroad Co.
DeQueen & Eastern Railroad Co.
East Camden & Highland Railroad Co.
East Chattanooga Belt Railway
East Cooper & Berkley Railroad
East Erie Commercial Railroad
East Jersey Railroad and Terminal Co.
East Penn Railroad, LLC

East Tennessee Railway, L.P.
Eastern Alabama Railway
Eastern Idaho Railroad
Eastern Illinois Railroad Company
Eastern Washington Gateway Railroad
Effingham Railroad Company
Escanaba & Lake Superior Railroad Co.
Evansville Western Railway
Everett Railroad Company
Finger Lakes Railway Corporation
First Coast Railroad
Flats Industrial Railroad
Florida Central Railroad Company
Florida Midland Railroad Company, Inc.
Florida Northern Railroad Company, Inc.
Florida West Coast Railroad Company
Fordyce & Princeton Railroad
Fore River Transportation Corp.
Formosa Plastics Corporation
Fort Smith Railroad Company
Fort Worth & Western Railroad
Fulton County Railway, LLC
Galveston Railroad, L. P.
Garden City Western Railway Co.
Gardendale Railroad, Inc.
Gary Railway Company
Genesee and Wyoming Railroad Co.
Georgetown Railroad Co.
Georgia Central Railway, L.P.
Georgia & Florida Railway, Inc.
Georgia Northeastern Railroad Co., Inc.
Georgia Southern Railway Company
Georgia Southwestern Railroad
Gettysburg & Northern Railroad Company
Goderich-Exeter Railway Co.
Golden Isles Terminal Railroad
Golden Triangle Railroad
Grafton & Upton Railroad Company
Grainbelt Corporation
Grand Canyon Railway, Inc.
Grand Elk Railroad, LLC
Grand Rapids Eastern Railroad, Inc.
Great Lakes Central Railroad
Great Northwest Railroad
Great River Railroad
Great Smoky Mountains Railroad
Great Walton Railroad Company, Inc.

Great Western Railway of Colorado
Green Mountain Railroad Corporation
Greenville & Western Railway Company, LLC
Gulf, Colorado & San Saba Railway
Gulf & Ohio Railways
Hampton & Branchville Railroad Co., Inc.
Hartwell Railroad Company
Heart of Georgia Railroad, Inc.
Huntsville & Madison County RR Authority
Huron Central Railway
Huron and Eastern Railway Co., Inc.
Idaho Northern & Pacific Railroad Co.
Illinois & Midland Railroad, Inc.
Illinois Railway, Inc.
Indian Creek Railroad Company
Indiana Eastern Railroad
Indiana Harbor Belt Railroad Co.
Indiana Northeastern Railroad Co., Inc.
Indiana & Ohio Railway Company
Indiana Rail Road Company
Indiana Southern Railroad, Inc.
Iowa Interstate Railroad, Ltd.
Iowa Northern Railway Company
Johnson County Airport Commission
Joppa & Eastern Railroad Company
The Juniata Terminal Company
Kanawha Rail Corp.
Kankakee, Beaverville & Southern Railroad
Kansas City Terminal Railway Company
Kansas and Oklahoma Railroad
Kaw River Railroad
Keokuk Junction Railway Company
Kettle Falls International Railway, LLC
Kiamichi Railroad Co.
Knoxville & Holston River Railroad
KWT Railway, Inc.
Kyle Railroad Company
Lahaina Kaanapali & Pacific Rail Road
Lake Michigan & Indiana Railroad Co.
Lake State Railway Company
Lake Superior & Ishpeming Railroad Co.
Lancaster & Chester Railway Company
Landisville Railroad, LLC
Lapeer Industrial Railroad Company
Laurinburg & Southern Railroad Company
Linea Coahuila Durango, S.A. de C.V.
Little Kanawha River Rail, Inc.

Little Rock Port Railroad
Little Rock & Western Railway, L.P.
Livonia, Avon & Lakeville Railroad Corp.
Lodestar Logistics Corporation
Louisiana & Delta Railroad, Inc.
Louisiana & North West Railroad Co.
Louisiana Southern Railroad
Louisville & Indiana Railroad
Louisville, New Albany & Corydon Railroad/Lucas Rail Lines
Luxapalila Valley Railroad'
Lycoming Valley Railroad Co.
Madison Railroad
Mahoning Valley Railway Co.
Manufacturers Railway Company
Manufacturers' Junction Railway Co.
Marquette Rail, LLC
Maryland & Delaware Railroad
Maryland Midland Railway Co.
Massachusetts Central Railroad Corp.
Massachusetts Coastal Railroad
Massena Terminal Railroad Co.
McCloud Railway Company
Meeker Southern Railroad
Meridian & Bigbee Railroad, LLC
Meridian Southern Railway LLC
M G Rail, Inc.
Michigan Shore Railroad, Inc.
Middletown & Hummelstown Railroad Co.
Mid-Michigan Railroad
Minnesota Commercial Railway Co.
Minnesota, Dakota & Western Railway Co.
Minnesota Northern Railroad, Inc.
Minnesota Prairie Line Inc.
Minnesota Southern Railway, Inc.
Mission Mountain Railroad
Mississippi Export Railroad Company
Mississippi Southern Railroad
Mississippi Tennessee Railroad, LLC
Missouri & Northern Arkansas Railroad Co.
Missouri North Central Railroad
Modesto & Empire Traction Co.
Montana Rail Link, Inc.
Montreal, Maine and Atlantic Railway Ltd.
Morristown & Erie Railway, Inc.
Moscow, Camden & San Augustine Railroad
Mt. Hood Railroad Company
Napa Valley Railroad Co.

Nash County Railroad Corporation
Nashville & Eastern Railroad Corp.
National Park Service Steamtown NHS
Nebkota Railway, Inc.
Nebraska Central Railroad Co.
Nebraska Kansas Colorado Railway
Nebraska Northeastern Railway Company
New England Central Railroad, Inc.
New England Southern Railroad Co.
New Jersey Rail Carrier, LLC
New Orleans & Gulf Coast Railway Co., Inc.
New Orleans Public Belt Railroad
New York & Atlantic Railway
New York Container Terminal, Inc.
New York New Jersey Rail LLC
New York & Ogdensburg Railway Co.
New York, Susquehanna & Western Rwy.
Newburgh & South Shore Railroad Co.
Nittany & Bald Eagle Railroad Co.
Norfolk and Portsmouth Belt Line
North Carolina & Virginia Railroad
North Shore Railroad Co.
Northern Lines Railway, LLC
Northern Ohio & Western Railway, LLC
Northern Plains Railroad, Inc.
Northshore Mining - Cliffs Natural Resources
Northwestern Oklahoma Railroad
Northwestern Pacific Railroad Company
Ohio Central Railroad Company
Ohio Southern Railroad Company
Ohio Valley Railroad Company
Ohi-Rail Corp.
Oil Creek & Titusville Lines, Inc.
Old Augusta Railroad, LLC
Omaha Lincoln & Beatrice Railway
Ontario Central Railroad Corporation
Ottawa Valley Railway
Otter Tail Valley Railroad
Pacific Harbor Line
Pacific Sun Railroad
Paducah & Louisville Railway, Inc.
Palouse River and Coulee City Railroad
Panhandle Northern Railroad Company
Patapsco & Back Rivers Railroad
Patriot Rail Corp.
Pecos Valley Southern Railway Co.
Pennsylvania Southwestern Railroad

Permian Basin Railways
The Philadelphia Belt Line Railroad Company
Pickens Railway Co.
Pinsly Railroad Co.
Pioneer Valley Railroad Co., Inc.
Pittsburgh, Allegheny & McKees Rocks RR
Pittsburgh & Ohio Central Railroad Co.
Plainsman Switching Company, Inc..
Point Comfort & Northern Railway Co.
Port Bienville Railroad
Port Jersey Railroad Co.
Port of Palm Beach District Railway
Port Terminal Railroad of South Carolina
Port Terminal Railroad Association
Port of Tillamook Bay Railroad
Port Utilities Commission of Charleston, SC
Portland & Western Railroad
Progressive Rail, Inc.
Providence & Worcester Railroad Co.
Puget Sound & Pacific Railroad
Quebec Gatineau Railway
Railtown 1897 State Historic Park
Reading Blue Mountain & Northern Railroad
Red River Valley & Western Railroad Co.
Redmont Railway Co., Inc.
Riceboro Southern Railway, LLC
Richmond Pacific Railroad
Rio Grande Pacific Corporation
Rio Valley Switching Company
Riverport Railroad LLC
Rochester & Southern Railroad, Inc.
Rock & Rail LLC
Rockdale, Sandow & Southern Railroad Co.
S & S Shortline Railroad
Sabine River & Northern Railroad
Sacramento Southern Railroad
Sacramento Valley Railroad, Inc.
Saginaw Bay Southern Railway Company
St. Lawrence & Atlantic Railroad, Inc. (Quebec)
St. Lawrence & Atlantic Railroad
St. Maries River Railroad Co.
St. Marys Railroad Company
Salt Lake City Southern Railroad Co.
Sand Springs Railway Co.
Sandersville Railroad Company
San Diego & Imperial Valley Railroad
San Francisco Bay Railroad

San Joaquin Valley Railroad Co.
San Luis Central Railroad Co.
San Luis & Rio Grande Railroad, Inc.
San Manuel Arizona Railroad Company
San Pedro & Southwestern Railroad
Santa Cruz, Big Trees & Pacific Railway Co.
Santa Maria Valley Railroad
Savage Bingham & Garfield Railroad
Savannah Port Terminal Railroad
Seminole Gulf Railway L.P.
Semo Port Railroad
Sequatchie Valley Railroad Company
Shenandoah Valley Railroad
Sidney & Lowe Railroad, Inc.
Sierra Northern Railway
SMS Rail Service
South Branch Valley Railroad
South Buffalo Railway
South Carolina Central Railroad Co.
South Carolina Public Railways Commission
South Central Florida Express, Inc.
South Central Tennessee Railroad
South Chicago & Indiana Harbor Railway Co.
South Kansas & Oklahoma Railroad
Southern Electric Railroad
Southern Ontario Railway
Southern Railway of British Columbia Ltd
Southwestern Railroad, Inc.
Steelton & Highspire Railroad Co.
Stillwater Central Railroad
Stockton Terminal & Eastern Railroad
Strasburg Rail Road Company
Tacoma Rail
Talleyrand Terminal Railroad Co., Inc.
Tazewell & Peoria Railroad, Inc.
Temple & Central Texas Railway, Inc.
Tennessee Southern Railroad Co.
Tennken Railroad Company, Inc.
Terminal Railroad Association of St. Louis
Terminal Railway-Alabama State Docks
Texas Central Business Lines Corporation
Texas Gonzales & Northern Railway Co.
Texas - New Mexico Railroad Co., Inc.
Texas North Western Railway Co.
Texas Pacific Transportation
Texas Rock Crusher Railway Co.
Texas South-Eastern Railroad Co.

Three Notch Railroad Co., Inc.
Timber Rock Railroad
TNW Corporation
Toledo, Peoria and Western Railway
Tomahawk Railway, L. P.
Transkentucky Transportation Railroad, Inc.
Tri-City Regional Port District
Trona Railway Company
Tulare Valley Railroad Company
Tulsa-Sapulpa Union Railway Co.
Turtle Creek Industrial Railroad Inc.
Twin Cities & Western Railroad Co.
Tyburn Railroad Company
Union Railroad Company
Upper Merion & Plymouth Railroad Co.
Utah Central Railway
Utah Railway Co.
Utah Southern Railroad Co., LLC
Valdosta Railway, L.P.
Vandalia Railroad Co.
Ventura County Railway Co.
Vermilion Valley Railroad Co., Inc.
Vermont Rail System
Vermont Railway Inc.
Vicksburg Southern Railroad
V & S Railway, LLC
Wabash Central Railroad Corporation
Walking Horse & Eastern Railroad Co.
Warren & Trumbull Railroad
Washington County Railroad Corp.
Wellsboro & Corning Railroad
West Tennessee Railroad Corporation
West Texas & Lubbock Railway Co.
West Virginia Central Railroad
Western New York and Pennsylvania Railroad
Western Rail Road Company
WFEC Railroad Company
White Pass & Yukon Route Railroad
Wichita Terminal Association
Wichita, Tillman & Jackson Railway Co.
Willamette Valley Railway Co.
Wilmington Terminal Railroad, L.P.
Winamac Southern Railway
Winchester & Western Railroad Co.
Wiregrass Central Railroad
Wisconsin & Southern Railroad Co.
Yadkin Valley Railroad

YCR Corp. (Yakima Central Railway)

York Railway Company

Youngstown & Austintown Railroad Co.

Youngstown Belt Railroad

Youngstown & Southeastern Railroad Co, Inc.

VERIFICATION

I, Richard F. Timmons, certify under penalty of perjury that the foregoing Verified Statement is true and correct to the best of my knowledge, information and belief. Further, I certify that I am qualified and authorized to file this Verified Statement.

A handwritten signature in black ink, reading "Richard F. Timmons". The signature is written in a cursive style with a large, stylized "R" and "T".

Richard F. Timmons.

Dated: January 31, 2011

Docket No. EP-704

**APPENDIX TO TESTIMONY OF
RICHARD F. TIMMONS ON BEHALF OF
THE AMERICAN SHORT LINE AND
REGIONAL RAILROAD ASSOCIATION**

The Subject Exemptions (*i.e.*, the commodity exemptions under 49 C.F.R. §§ 1039.10 and 1039.11, the boxcar exemptions under 49 C.F.R. § 1039.14 and the trailer-on-flatcar/container on flatcar (TOFC/COFC) exemptions¹ under 40 C.F.R. pt 1090) are effective, have worked exactly as intended by Congress and benefit both railroads and shippers. There is no need to revisit the rationale underlying the Subject Exemptions because petitions to revoke provide an effective mechanism for aggrieved parties to seek review of those exemptions. In addition, periodic reviews of the Subject

¹ Most short lines do not handle large volumes of TOFC/COFC traffic, so this Appendix focuses on the other two exemptions.

Exemptions generally are unnecessary, would force small railroads² with limited resources to incur substantial costs to repeatedly defend the exemptions, and effectively might shift the burden of proof to the railroads to prove regulation of the subject traffic continued to be unwarranted. The Board should refrain from taking any action that would limit or otherwise dilute the effectiveness of the Subject Exemptions. Instead, the Board should continue to uphold the statutory mandate to exempt traffic to the maximum extent possible.

II. The Subject Exemptions Are Especially Important to Small Railroads.

As discussed in more detail below, the Subject Exemptions are critical to the financial health of small railroads. It is estimated that approximately 50 percent of small railroad traffic consists of boxcar traffic and exempt commodities. Therefore, any limitations placed on the Subject Exemptions would have a disproportionate impact on short lines. In addition, any such limitation would be unwarranted given the level of competition that exists for the subject traffic. For short line railroads, the traffic at issue is particularly susceptible to competition from trucks and from transload and intermodal facilities because the rail systems of short lines (1) consist of a relatively small number of miles, and (2) are in close proximity to Class I railroads.

² For purposes of this Appendix, the terms "small railroads" and "short line railroads" shall refer to Class II and Class III railroads.

Limiting the Subject Exemptions would negatively affect the ability of small railroads to compete for this traffic, which would not only harm small railroads, but would also reduce the competitive options of the shippers. Moreover, small railroads possess limited market power, both in terms of their market share and their ability to affect the overall price charged to a customer for an interline move. Accordingly, small railroads are not in a position to abuse market power with respect to the exempt traffic.

III. The Important Statutory Role of Exemptions.

A. ICCTA Requires the Board to Exempt Persons, Transactions or Services When Certain Factors Are Present

Section 10502(a) of the ICC Termination Act of 1995 ("ICCTA ") directs the Board to exempt persons, transactions or services in certain circumstances:

In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board under this part, *the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service* whenever the Board finds that the application in whole or in part of a provision of this part --

- (1) is not necessary to carry out the transportation policy of section 10101 of this title; and
- (2) either –
 - (A) the transaction or service is of limited scope; or
 - (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

See 49 U.S.C. § 10502(a) (emphasis added).

The statutory directive to the Board is clear: whenever the Board makes the determinations set forth in clauses (1) and (2), the Board *shall* exempt a person, class of persons, transaction or service from the application of the provisions of ICCTA at issue. Thus, the Board has a mandatory obligation to provide exemptions when the statutory criteria are satisfied; under such circumstances, the Board does not have the discretion nevertheless to impose regulatory oversight. See *Coal Exporters Association of the United States, Inc. v. United States*, 745 F.2d 76, 82 (D.C. Cir. 1984) ("*Coal Exporters*") (stating that "[w]here ICC properly finds the conditions to be present, it has no choice but to grant an exemption.").

With respect to each of the Subject Exemptions, the Board (or its predecessor, the Interstate Commerce Commission (the "Commission")) specifically determined that the exemption criteria applied.³ Accordingly, the Board/Commission followed its statutory directive and exempted these traffic types.

³ See e.g. *Rail General Exemption Authority -- Nonferrous Recyclables*, STB Ex Parte No. 561, 3 STB 62, served April 21, 1998; *Rail General Exemption Authority -- Exemption of Ferrrous Recyclables*, Ex Parte No. 346 (Sub-No. 35), 1 STB 173, served Sept. 9, 1996; *Exemption from Regulation -- Rail Transportation Frozen Food*, Ex Parte No. 346 (Sub-No. 15), 367 ICC 859, decided Nov. 30, 1983; *Rail General Exemption Authority -- Miscellaneous Agricultural Commodities*, Ex Parte No. 346 (Sub-No. 14), 367 ICC 298, decided Feb. 17, 1983; *Improvement of TOFC/COFC Regulation*, Ex Parte No. 230 (Sub-No. 5), 364 ICC 731, decided Feb. 19, 1981.

B. The Exemption Power Historically Has Been Viewed As An Essential Tool To Enable The Rail Industry To Effectively Compete.

Over the past 35 years, Congress has passed three pieces of legislation that comprehensively analyzed and shaped the regulatory landscape of the rail industry: the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act"); the Staggers Act of 1980; and ICCTA. In each case, Congress determined that a key component to the restoration and/or continuation of the rail industry's financial health was the power of the ICC/Board to exempt railroads from regulation when certain criteria were satisfied. In fact, with the passing of each of these statutes, Congress expanded the role of exemptions so the rail industry would not be saddled with unwarranted regulation.

When the 4-R Act was passed, the rail industry was in dire financial straits. The purpose of the 4-R Act was "to promote the revitalization of the railroad industry in the United States." *See* S. Rep. No. 94-499, 94th Cong., 2d Sess. 2 (1976). The legislative history identified an "outmoded regulatory system" as one of the major hurdles facing the railroad industry. *Id.* One of the new provisions of the 4-R Act was to permit the Commission to exempt certain traffic from regulation, if specific criteria were satisfied. *See* P. L. No. 94-210, 90 Stat. 31 (1976), at Section 207.

For instance, pursuant to the 4-R Act, the ICC exempted certain fresh fruits and vegetables from most regulation. In that ruling, the ICC concluded that it had

"provided the broadest possible exemption to permit the railroads maximum flexibility to compete," and it "encourage[d] the railroads to make maximum use of this exemption to improve service and to foster competitive ratemaking."⁴ At that time, the ICC viewed its exemption power as an important tool to revive rail competition. With respect to the fruits and vegetables exemption, the ICC stated "this exemption as drafted and the flexibility which it will afford the railroads is essential to reverse the steady trend of declining railroad participation in the fresh fruit and vegetable market."⁵

Although the 4-R Act made important strides in eliminating unnecessary regulation, it did not go far enough. See H.R. Rep. 96-1035, 96th Cong., 2d Sess. 38 (1980) (noting that "the 4R Act does not provide sufficient rate flexibility"). In 1980, the Staggers Act was enacted, in recognition of "the need to revamp the regulatory scheme governing the rail industry." See *American Trucking Associations, Inc. v. Interstate Commerce Commission*, 656 F.2d 1115, 1118 (5th Cir. 1981) (citing Staggers Rail Act of 1980, 94 Stat., 1895, Section 2). The legislative history noted that "the overall effect of [federal] regulation has meant that railroads have been severely handicapped in their ability to compete with other modes of transportation." See H.R. Rep. 96-1035 at 38.

⁴ *Rail General Exemption Authority – Fresh Fruits and Vegetables*, 361 ICC 211, 220 (1979), clarified in *Rail General Exemption Authority – Fresh Fruits and Vegetables*, 361 ICC 374 (1979).

⁵ *Rail General Exemption Authority – Fresh Fruits and Vegetables*, 361 ICC at 377.

As part of the new regulatory scheme, the ICC's exemption power was broadened, which was considered an "important cornerstone[]" of the Staggers Act. *See* H.R. Rep. 96-1035 at 60. The legislative history demonstrates that the ICC was expected to use its exemption power liberally. *See id.* (stating that the ICC was "charged with the responsibility of actively pursuing exemptions for transportation and service that comply with the section's standards."); H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 105 (1980) (noting that "the conferees expect that as many as possible of the Commission's restrictions on changes in prices and services by rail carriers will be removed and that the Commission will adopt a policy of reviewing carrier actions after the fact to correct abuses of market power.").

In enacting the ICCTA, Congress confirmed that "exemptions have proven highly beneficial to shippers and railroads", *see* S. Rep. No. 104-176, 104th Cong., 1st Sess. 8 (1995). Under ICCTA, the importance of actively and liberally using exemption power was further emphasized. *See* 10502(a); H.R. Rep. No. 104-311, 104th Cong., 1st Sess. 96 (1995) (noting that the statutory language "makes it an explicit part of the agency's statutory duty to utilize exemptions to the maximum extent permissible under the law."). Although the financial condition of the railroad industry had greatly improved as a result of the deregulatory aspects of the 4-R Act and the Staggers Act,

Congress, in enacting ICCTA, recognized and further emphasized the important role exemptions play in sustaining rail competition.

II. The Subject Exemptions Are Effective.

The Board/Commission appropriately followed its statutory directive to exempt the traffic covered by the Subject Exemptions. These exemptions have been wholly effective -- i.e., the exemptions have promoted and sustained vigorous intermodal competition. No regulation of boxcar traffic and exempt commodities is warranted, because this traffic is subject to intense inter- and intra-modal competition, rendering the exercise of market power a remote possibility.

A. The Subject Traffic Is Competitive.

In its decision exempting boxcar traffic, the Commission described the competitive landscape for merchandise traffic as follows:

Virtually anything that can be transported in a boxcar can be transported in a truck. Motor carriage tends to be faster, more accessible, more convenient, and sometimes less damaging to freight than rail service, meaning that boxcar transportation generally must be priced to reflect those service differences to compete successfully. Thus, the market itself places an effective ceiling on rail rates for boxcar transportation, and regulation is unnecessary to assure that boxcar rates do not rise to unreasonably high levels.

Exemption from Regulation--Boxcar Traffic, 367 I.C.C. 424, 433 (1983). In fact, the competitive landscape has become more intense in the years since the ICC issued that

decision. The vigorous competition for boxcar traffic and exempt commodities has kept prices extremely competitive.

For the short lines, the competition for boxcar traffic and exempt commodities is particularly intense. That is because small railroads, by definition, operate small systems that are in close proximity to Class I carriers. Traffic moving over short distances (500 miles or less) is particularly susceptible to truck transportation. For example, because a short line generally accounts for only a small portion of the mileage of any interline move, shippers frequently have an opportunity to bypass a small railroad by trucking their cargo to the nearest transload facility on a Class I rail system. Shippers also can bypass short lines by making intermodal shipments that move onto rails at intermodal facilities served by a Class I carrier. These options make small railroads susceptible to traffic diversion in ways that generally do not affect Class I carriers.

B. Small Railroads Are Not Abusing Market Power and Their Operations Are Limited In Scope.

The Subject Exemptions also are effective with respect to small railroads because, in general, those carriers have only a limited ability to abuse market power. According to Railroad Facts (Association of American Railroads 2010 edition), the nation's 556 small railroads operate 32 percent of the railroad miles in the country, but earn *only* 4.22 percent of railroad revenue. In addition, because they control only a small portion of

most interline moves, small railroads generally have a limited ability to affect the overall price charged to a customer for interline traffic. Indeed, under the marketing arrangements that are in place for many short lines, the small railroad receives a contractual allowance from its interline connection and does not have discretion with respect to origin-to-destination pricing. Accordingly, both in terms of market share and pricing authority, small railroads are not in a position to abuse market power.

Similarly, small railroad operations are limited in scope. The average short line operates 71 miles of rail lines and handles approximately 13,368 carloads of traffic per year. To put these numbers in perspective, the *smallest* Class I railroad operates 5,823 miles of rail line and handles 361,695 carloads of traffic per year. Accordingly, short line operations are limited in scope.

C. Regulation of Subject Traffic Moved By Small Railroads Is Unnecessary And Would Harm Both Small Railroads And Shippers.

There is no need to regulate small railroads with respect to the subject traffic because, as discussed above, the traffic is subject to intense competition and the characteristics of small railroads are such that there is no evidence of an abuse of market power. See *Coal Exporters*, 745 F.2d at 90 (stating that limitations on agency's exemption power "are met with a proper finding of an absence of 'market power' and the presence

of 'effective competition'.")⁶ In addition, the other criteria of Section 10502(a) are clearly met. Regulation of the traffic covered by those exemptions is not necessary to carry out the transportation policy of Section 10101 of ICCTA,⁷ and the traffic is limited in scope.

Limiting the Subject Exemptions would especially harm small railroads because much of the traffic handled by short lines is covered by those exemptions. Based on interchange data provided to a member of the American Short Line and Regional Railroad Association by one eastern Class I and one western Class I, it appears that more than 50 percent of small railroad traffic consists of boxcar traffic and exempt commodities.⁸ For Class I carriers, on the other hand, boxcar traffic and exempt commodities make up a much smaller portion of those railroads' overall traffic base. Accordingly, the exemptions for boxcar traffic and exempt commodities affect a much higher percentage of small railroad traffic than Class I traffic. Any action by the Board

⁶ See also H.R. Conf. Rep. 104-422, 104th Cong., 1st Sess. 168 (1995) (cautioning the Board, in determining the appropriateness of an exemption, to "examine all competitive transportation facts that restrain rail carriers' actions and that affect the market for transportation of the particular commodity or type of service.").

⁷ As a general matter, these transportation policies are unlikely to be advanced by regulating small railroads, which have a median annual revenue of \$2.5 million and only a limited ability to abuse market power.

⁸ Many small railroads have a traffic base that consists mostly of boxcar traffic. For example, in 2009, boxcar traffic made up 85 percent of Tomahawk Railway's traffic, 73 percent of Valdosta Railway's traffic, and 67 percent of Chattahoochee Industrial Railroad's traffic.

to curtail or limit the exemptions would have a disproportionately adverse effect on small railroads.

It is also important to note that railroads are not the only beneficiaries of exemptions. By deregulating exempt traffic, railroads are able to compete freely in markets that previously were dominated by trucks (*e.g.*, fresh fruits and vegetables). Short line marketing personnel fight a constant battle to preserve market share. The exemption of boxcar traffic and the exempt commodities has allowed the free market to function and the short lines to be competitive. Thus, the exemptions benefit shippers by providing them with a competitive alternative to trucks or other modes of transportation. Such competition forces all modes of transportation to provide more efficient and economical service in order to maintain their market share. Shippers are beneficiaries of this competition. As noted in ICCTA legislative history, "exemptions have proven highly beneficial to shippers *and* railroads." *See* S. Rep. No. 104-176, 104th Cong., 1st Sess. 8 (1995) (emphasis added).

III. Revisiting the Rationale Underlying the Subject Exemptions Is Unwarranted.

Revisiting the rationale underlying the Subject Exemptions is unwarranted. *First*, shippers (or other affected persons) already have the ability to file with the Board a petition to revoke the Subject Exemptions. Petitions to revoke provide petitioners with a tailored remedy, whereby the Board can review the exemption as it applies to the

specific moves of the petitioner. *Second*, the fact that petitions to revoke the Subject Exemptions have not been filed often in the last 15 years demonstrates that there is no need to revisit the rationale of these exemptions. *Third*, with respect to petitions to revoke the boxcar and commodity exemptions that have been filed in the last 15 years, those petitions generally appear to be highly fact-specific. These filings indicate that the tailored remedy offered by the revocation procedures is more appropriate than a review of the general rationale underlying the Subject Exemptions.

A. The Statutory Framework Provides For Tailored Review Of Exemptions.

Revisiting the rationale underlying the Subject Exemptions is unnecessary in light of the statutory remedy that already exists for review and, when necessary, revocation of exemptions. Under 49 U.S.C. 10502(d), if a shipper or other person believes that Board regulation of exempt traffic is necessary, it may file a petition to revoke the exemption. By statute, the Board must determine whether to commence a proceeding within 90 days after receipt of such a request, and if such a proceeding is commenced, it must be completed within 9 months. *Id.*

The current revocation remedy provides a targeted review of an exemption, as applied to specific traffic moves. “Exemption analysis takes a broad-brush approach to analysis of the competitive environment as a whole and looks to the remedy of partial revocation to address specific competitive situations should that become necessary.”

Santa Fe Southern Pacific Corp. – Control – Southern Pacific Transportation Company, 2 I.C.C.2d 709, 741 (1986). *See also Brae Corporation v. United States*, 740 F.2d 1023, 1043 (D.C. Cir. 1984) (noting that "Congress itself envisioned after the fact review to correct isolated market abuses that may follow the lifting of protective regulations"). This approach recognizes that although exempt traffic generally may satisfy the exemption criteria, there may be situations in which the traffic is subject to a unique competitive environment.

Under present law, a petition for revocation can address, on a case-by-case basis, any specific need for regulation of exempt traffic. Accordingly, there does not appear to be any need to revisit the rationale underlying the Subject Exemptions.

B. Petitions to Revoke the Subject Exemptions Are Not Often Filed And Are Highly Fact-Specific.

Petitions to revoke the Subject Exemptions are not often filed, which strongly indicates (1) the exemptions are working as intended, and (2) there is no need to revisit the general rationale underlying these exemptions. In 1994, the Commission determined that, in general, "[t]here have been few petitions to revoke an exemption, either in whole or in part that challenged the merits of an exemption", and that "most

revocation requests have been denied.”⁹ At least with respect to the Subject Exemptions, this characterization of revocation petitions remains the same -- over the last 15 years, it appears that relatively few petitions to revoke the Subject Exemptions were filed, and even fewer were granted. If the Subject Exemptions were actually resulting in widespread abuses by small railroads, that fact would be reflected in a large number of petitions to revoke.

However, equally important as the number of revocation petitions filed over the last 15 years is the *reason* for such filings. Revocation petitions involving the boxcar and commodity exemptions generally appear to be highly fact-specific (*e.g.*, petitions to revoke filed to pursue claims of specific service deficiencies with respect to particular rail lines).¹⁰

⁹ See Study of Interstate Commerce Commission Regulatory Responsibilities Pursuant To Section 210(A) of the Trucking Industry Regulatory Reform Act of 1994, issued October 25, 1994, 1994 WL 639996 (I.C.C.), at *7 (footnotes omitted).

¹⁰ See *e.g.*, *Roseburg Forest Products Co., et al. -- Alternative Rail Service -- Central Oregon & Pacific Railroad, Inc.; Rail General Exemption Authority -- Petition for Partial Revocation of Commodity Exemption -- Lumber or Wood Products*, STB Finance Docket No. 35175; Ex Parte No. 346 (Sub-No. 25-C), 2009 WL 536893, served March 4, 2009 (revocation filing related to petition pursuant to 49 C.F.R. Pt 1146 for interim alternative rail service for certain exempt *and non-exempt* products over rail line); *Pyco Industries, Inc. -- Alternative Rail Service -- South Plains Switching, Ltd. Co.; Rail General Exemption Authority -- Miscellaneous Agricultural Commodities -- Pyco Industries, Inc. Petition for Partial Revocation*, STB Ex Parte No. 346 (Sub-No. 14C), 2006 WL 3368136, served June 21, 2006 (revocation filing related to petition pursuant to 49 C.F.R. Pt. 1147 for temporary alternative rail service for certain exempt *and non-exempt* commodities over rail lines); *Michael H. Meyer, Trustee in Bankruptcy for California Western Railroad, Inc. v. North Coast Railroad Authority, d/b/a Northwestern Pacific Railroad*, STB Finance Docket No. 34337, 2005 WL 3090148 (S.T.B.), served Nov. 18, 2005 (revocation filing related to complaint *by carrier* that connecting carrier violated common carrier obligation when it ceased rail service pursuant to emergency order of FRA); *Granite State Concrete Co., Inc. and Milford--Bennington Railroad Company, Inc. v. Boston and Maine Corporation and Springfield Terminal Railway Company*, STB Docket No. 42083, 2003 WL 22121645 (S.T.B.),

A general review of the rationale underlying the Subject Exemptions would not capture the fact-specific nature of these types of claims. This is especially the case given the fact that, as recently as 2007, the Board acknowledged in two separate proceedings that the developed record "offer[ed] no evidence that the marketplace has materially changed for any of the exempted categories of traffic since the findings were made to exempt that traffic from regulation."¹¹ Accordingly, the tailored remedy offered by the current revocation procedure appears to be particularly appropriate with respect to boxcar and commodity exemptions.

IV. The Subject Exemptions Should Not Be Subject To Periodic Review.

Periodic reviews of the Subject Exemptions are generally not necessary. As discussed above, the revocation framework provides shippers (and others) with an appropriate mechanism for reviewing exemptions for specific abuses. Accordingly, a revocation petition offers a far more efficient and effective method of review than general, periodic inquiries with respect to the Subject Exemptions.

served Sept. 15, 2003 (revocation filing related to complaint by shipper and rail carrier that second rail carrier improperly blocked first rail carrier's use of trackage rights); and *Bolen-Brunsen-Bell Lumber Company, Inc. v. CSX Transportation, Inc.; Rail General Exemption Authority -- Lumber or Wood Products*, STB Finance Docket No. 34236; Ex Parte No. 346 (Sub-No. 25), 2003 WL 21108185 (S.T.B.), served May 15, 2003 (revocation filing related to complaint that rail carrier maintained embargo unlawfully).

¹¹ See *Rail Fuel Surcharges*, STB Ex Parte 661, 2007 WL 201205 (S.T.B.), at *10, served January 26, 2007 ("*Fuel Surcharges Decision*"); *Simplified Standards for Rail Rate Cases*, Ex Parte No. 646 (Sub-No. 1), 2007 WL 2493509 (S.T.B.), served Sept. 5, 2007 (*citing Fuel Surcharges Decision*) (*superceded and vacated in part*).

Also, because a large percentage of small railroad traffic consists of exempt traffic, instituting periodic reviews of the Subject Exemptions would force small railroads, which, by definition, have limited resources, to repeatedly defend the appropriateness of such exemptions. Small railroads simply lack the resources to do so. Small railroads would be left without a good option: either (a) small railroads decline to participate in the multiple proceedings and risk that the Board, without the benefit of pleadings focused on the competitive market faced specifically by short line railroads, curtails exemptions for traffic that comprise more than 50 percent of short line traffic, or (b) small railroads repeatedly participate in such proceedings, using limited resources that would be better invested in infrastructure, capital improvements and marketing. In either option, the end result could adversely affect competition and the financial health of small railroads, which would be of no benefit to shippers.

Currently, the person or entity seeking the revocation of exempt traffic has the burden to prove that regulation of such traffic is unnecessary.¹² This approach is consistent with ICCTA legislative history. *See* H.R. Conf. Rep. 104-422, at 169 (stating that "[w]hen considering a revocation request, the Board should continue to require *demonstrated* abuse of market power that can be remedied only by reimposition of

¹² *See Riverview Trenton Railroad Company -- Petition for Exemption From 49 U.S.C. 10901 To Acquire And Operate A Rail Line In Wayne County, MI*, 2007 WL 4217502, served Nov. 30, 2007 (noting that "[t]he party seeking revocation has the burden of proof and must provide reasonable, specific concerns to demonstrate that revocation is warranted") (citations omitted).

regulation or that regulation is needed to carry out the national transportation policy") (emphasis added.) If, in the absence of credible complaints, the Board engages in periodic reviews of the Subject Exemptions, such an approach would put railroads in the difficult position of repeatedly defending the Subject Exemptions from generalized or unsupported assertions by shippers or other entities. This type of proceeding effectively could shift the burden of proof to the railroad (*i.e.*, the railroad would need to prove the exemption should be left in place rather than the shipper proving, with specific evidence, that the exemption should be revoked).

Nevertheless, small railroads understand that reviews of the Subject Exemptions may be warranted upon evidence that the competitive landscape related to these exemptions has shifted, which is not the case today. However, for the reasons set forth above, if the Board commences periodic reviews of the Subject Exemptions, participants in such proceedings that favor a full or partial revocation of a Subject Exemption should have the burden of proof. Such an approach would be consistent with the current standard under petitions for revocations (*i.e.*, a petitioner seeking to revoke an exemption has the burden to demonstrate, with specific evidence, that Board regulation is required). Otherwise, such proceedings would appear to be in conflict with the legislative framework favoring exemptions.

V. Conclusion

For the foregoing reasons, the ASLRRA respectfully request that the Board (i) refrain from curtailing or limiting the Subject Exemptions, which would have a disproportionately negative impact on small railroads (ii) continue to rely on the revocation mechanism currently in place to correct any abuses of the Subject Exemptions, and (iii) generally refrain from engaging in periodic reviews of the Subject Exemptions that will force small railroads to engage in costly proceedings and that might effectively shift the burden of proof to the railroads with respect to the appropriateness of an exemption.